Filed 5/22/12 In re A.C. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re A.C. et al., Persons Coming Under the Juvenile Court Law.	B232012 (Los Angeles County Super. Ct. No. CK84407)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. GREGORIO B., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Stephen Marpet, Juvenile Court Referee. Affirmed in part; reversed in part and remanded.

Joseph D. Mackenzie, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel and Tracey F. Dodds, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for Minors.

* * * * * *

Appellant Gregorio B. (father) appeals from the juvenile court's jurisdictional and dispositional orders pertaining to his seven-year-old biological son, Andrew B., made after father repeatedly raped and then impregnated his stepdaughter, A.C., who gave birth to father's second son at the age of 14. The juvenile court took jurisdiction over Andrew under Welfare and Institutions Code section 300, subdivisions (b), (d), and (j).[1] We agree with father that there was insufficient evidence to support the juvenile court's jurisdiction over Andrew under subdivisions (b) and (d), but we find the evidence supported a jurisdictional finding under subdivision (j). We also find father's challenge to the disposition order without merit.

FACTUAL AND PROCEDURAL BACKGROUND

A.C. was six years old when her mother (mother) began a relationship with father and he moved in with them.[2] A.C. referred to father as "my daddy." Starting when A.C. was ten years old, father forcibly raped her four times. She was too afraid to tell mother, fearing that mother would blame her. The last time father raped her was when she was 14. When she tried to resist, he threatened to tell mother about the previous incidents. Soon after this last incident, A.C. suspected she was pregnant and told father, who promised to take care of the baby, and told A.C. not to tell mother she was pregnant. A.C. received no prenatal care. A.C. did not tell mother about the sexual abuse or the pregnancy until she went into labor. Mother was shocked and devastated and immediately contacted the police, who interviewed father. Father admitted having sex with A.C. four times, but denied that he forced her. He also admitted knowing she was pregnant. Father was arrested. A.C. and mother brought the baby home.

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[1] All statutory references shall be to the Welfare and Institutions Code, unless otherwise noted.

[2] A.C.'s biological father abandoned her and mother when A.C. was about three years old and his whereabouts are unknown. Neither A.C., her son, nor mother are parties to this appeal.

Andrew was six years old at the time the baby was born. When the social worker interviewed him at school, she did not observe any marks or bruises on his exposed body parts. He stated that when he gets in trouble, mother spanks his buttocks but father does nothing. He stated that father was "lost," and not coming home. Andrew denied being scared of his parents or having his "private parts" touched, and denied any domestic violence between his parents. He reported that father treated A.C. "nice" and brought her "stuff every day."

On September 29, 2010, the Los Angeles County Department of Children and Family Services (the Department) filed a section 300 petition on behalf of A.C. and Andrew. The petition, which was ultimately sustained only against father, alleged that his conduct in "repeatedly forcibly rap[ing]" A.C. endangered her and placed her and Andrew "at risk of physical and emotional harm, damage, danger, sexual abuse and failure to protect."

Father was not present at the detention hearing. The court detained the children from their fathers and placed them with mother. The court ordered that father be provided with reunification services regarding Andrew, have no contact at all with A.C. and no telephone contact with Andrew, and be allowed monitored visits with Andrew at a Department-approved location if father was released from custody. Father was present in court a few days later on October 5, 2010 and counsel was appointed for him. He objected to the order prohibiting him from speaking with Andrew.

In its November 17, 2010 jurisdiction/disposition report, the Department reported that A.C. told the social worker her life was "over" because she was a 14-year-old girl with a baby. She was not going to school but staying home alone with the baby while mother worked. Mother would not let her talk to anyone or see her friends because she did not want anyone to know what had happened. A.C. also reported that when she looks at the baby she "remembers the pain and sadness" she felt during the rapes.

Andrew told the social worker, "'I don't really know what is going on with my sister and the baby, I just know my dad is lost, they can't find him and my sister had a

baby. That's all I know. Before my dad was missing, he was a nice dad to me, he never did anything to make me feel uncomfortable or anything like that. I never saw him do anything to my sister or be mean to her or anything, I just go to school and play with my friends, that's all I do." Andrew also stated that he missed father.

Mother repeated that she was devastated and stated, "Now there is a baby and I don't know what to tell people." She explained that she was not trying to isolate A.C., but she did not want A.C. to tell her friends the circumstances surrounding the birth because it would create more problems for the family given the small community in which they lived. She also stated that Andrew might be confused because he only knew that father was missing.

Father told the social worker he never forced or threatened A.C. into having sex, that it first started when she was 13, it happened four times, and he only learned about the pregnancy about a month before A.C. gave birth. Father also stated, "All I know is that I made a mistake, and all I want to do now is go back to my country [Mexico] and have phone contact with my son Andrew. I am aware that now there is a baby and I am the father but given the circumstances I want the court to decide what will happen. I am not asking to be reunified with that baby, all I want is to have contact with Andrew via telephone because I have no intentions of returning to [the] United States. When my son Andrew is old enough he can decide whether he wants to visit with me or live with me. Only time will tell." Father also stated he had "no intentions of reunifying with anybody."

The social worker opined that father "has demonstrated a lack of boundary setting in a parent/child relationship and he has demonstrated a lack of insight about being a protective parent as he continues to make statements indicating that his inappropriate relationship with [A.C.] was not forced. The latter demonstrates [father's] thought process and inability to understand the physical and emotional harm and danger created by his actions and his failure to be a protective parent when he was placed in the role of

stepfather." The Department recommended no reunification services for father, but that he be allowed monitored visits with Andrew.

In its January 19, 2011 report, the Department reported that mother and the children were enrolled in individual counseling to address the sexual abuse issues, mother and A.C. were continuing to explore the possibility of mother adopting the baby, and the family had decided to let family and friends believe the baby is mother's biological child, which "continues to create issues for this family." The Department continued to recommend no reunification services for father, and stated, "[Father] violated the trust his children placed in him as a father, by fathering his son, Andrew's step-sister's baby . . . which has now created a chaotic and confusing family system that this family will have to deal with for the rest of their lives. Further, [father] medically neglected and endangered [A.C. and the baby]'s well being when he knew that [A.C.] was pregnant yet he neglected to ensure that [she] received any prenatal care because he was more concerned with keeping the pregnancy a secret from mother []. This latter demonstrates gross negligence on the part of [father] and further demonstrates that his deviant sexual behavior places any child in his care at risk for abuse." DNA testing of the baby indicated that father "is included as a possible biological father."

Father was present in custody at the jurisdiction/disposition hearing on February 28, 2011. Andrew's attorney joined in the Department's request to sustain the petition and deny father reunification services. The court found that the actions of father "are substantiated by more than a preponderance of the evidence" to sustain the petition against him. As to disposition, the court ordered that "in light of the heinous nature of the insult to [A.C.]" no reunification services be given to father and that he have no contact with A.C. or Andrew. Father's appeal followed.

DISCUSSION

I. Jurisdictional Findings

The juvenile court asserted jurisdiction over Andrew under section 300, subdivisions (b), (d), and (j). Father contends there was insufficient evidence to support jurisdiction under any of these subdivisions.

A. Standard of Review

Challenges to a juvenile court's jurisdictional findings are reviewed for substantial evidence. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1649; *In re Clara B.* (1993) 20 Cal.App.4th 988, 1000.) Substantial evidence is evidence that is "'reasonable, credible and of solid value'" such that a reasonable trier of fact could make such findings. (*In re Christina A.* (1989) 213 Cal.App.3d 1073, 1080.) "We review the record to determine whether there is any substantial evidence, contradicted or not, which supports the court's conclusions." (*In re Kristin H., supra,* at p. 1649.) "'All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the verdict, if possible.'" (*Ibid.*) Issues of fact and credibility are questions for the trial court and it is not our function to redetermine them. (*In re Rubisela E.* (2000) 85 Cal.App.4th 177, 195; *In re B.D.* (2007) 156 Cal.App.4th 975, 986.) """"In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing*."""" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.)

B. Section 300, Subdivision (b)

Section 300, subdivision (b) provides that a child comes within the jurisdiction of the juvenile court and may be adjudged a dependent child of the court if the child has suffered, or there is a substantial risk the child will suffer, serious physical harm or illness as a result of the parent's failure or inability to adequately supervise or protect the child or inability to provide regular care for the child due to the parent's substance abuse.

Father argues the evidence was insufficient to support a finding of jurisdiction under this subdivision because Andrew was physically unharmed and there was no evidence that he was at risk of suffering serious physical harm or illness as a result of father's failure or inability to adequately supervise or protect him. We tend to agree. The record shows that when the social worker interviewed Andrew at school she did not see any signs of physical abuse on his exposed body parts. Andrew reported that he was not afraid of father, that father did not physically discipline him, and that father had not touched his private parts or made him feel uncomfortable. While the law does not require a child to be actually harmed before the Department and the juvenile court may intervene (*In re Eric B.* (1987) 189 Cal.App.3d 996, 1002–1003), the evidence was insufficient to show that Andrew was at risk of serious physical harm by father. Therefore, we direct the juvenile court to strike section (b-1) of the petition as it relates to Andrew.

C. Section 300, Subdivision (d)

Section 300, subdivision (d) provides jurisdiction when "[t]he child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse."

Father points out that he never sexually abused Andrew and argues there was no evidence to support a finding that Andrew was at substantial risk of being sexually abused by father. We agree.

We recognize there is a split among the courts as to whether the sexual abuse of a female minor is sufficient to support a finding that a male sibling is at risk of sexual abuse. In *In re Rubisela E.*, *supra,* 85 Cal.App.4th 177, this division found that where a father had sexually abused his 13-year-old daughter, the juvenile court could properly find that the victim's 11-year-old sister was also at risk of sexual abuse because it was

reasonable to assume that the father would turn to the sister in the victim's absence. (*Id.* at p. 197.) But the court also found that the evidence of sexual abuse was insufficient by itself to support the finding that the victim's four brothers were at similar risk of sexual abuse. (*Id.* at p. 199.) While this court noted the "real possibility" that brothers of molested sisters can also be harmed in other ways by the fact of the molestation within the family, there was no evidence of such harm before it. (*Id.* at p. 198.)

In *In re Karen R.* (2001) 95 Cal.App.4th 84, Division Three of this district disagreed with *Rubisela E.*, and concluded that a father who had "committed two incidents of forcible incestuous rape" of his thirteen-year-old daughter "reasonably can be said to be so sexually aberrant that both male and female siblings of the victim are at substantial risk of sexual abuse within the meaning of section 300, subdivision (d), if left in the home." (*In re Karen R.*, *supra*, at pp. 90–91.) In that case, the evidence showed that the victim's male siblings had witnessed other forms of physical abuse by the father and heard their sister report the rape to their mother, who refused to help. (*Id.* at p. 90.)

In *In re P.A.* (2006) 144 Cal.App.4th 1339, the same division again declined to follow *Rubisela E.*, and found that a father who had sexually abused his nine-year-old daughter reasonably could be found to pose a risk of sexual abuse to the victim's two brothers, ages five and eight, because they were approaching the same age at which their father had begun abusing their sister and the father had easy access to the boys when he covered them at night. (*In re P.A.*, *supra*, at p 1345.)

In *In re Andy G.* (2010) 183 Cal.App.4th 1405, Division Eight of this district affirmed the juvenile court's finding that a two-year-old boy was at risk of sexual abuse under section 300, subdivisions (d) and (j) where the boy's father had sexually abused the boy's 12-and 14-year-old half sisters. (*In re Andy G.*, *supra*, at pp. 1414–1415.) The *Andy G.* court agreed with the proposition advanced in *P.A.* that "'*aberrant sexual behavior by a parent places the victim's siblings who remain in the home at risk of aberrant sexual behavior*.'" (*In re Andy G.*, *supra*, at p. 1414.) The only significant difference from *P.A.* was the fact that Andy was only two and one-half years old at the

time of the court's orders, and therefore not "'approaching the age'" at which his sisters were abused. But the *Andy G.* court upheld the jurisdictional findings because the evidence also showed that the father exposed himself to one of Andy's half siblings in the same room as Andy. (*In re Andy G.*, *supra*, at p. 1414.) Although Andy was facing the other direction at the time and was too young to be cognizant of what was happening, *Andy G*. nevertheless concluded, "This evinces, at best, a total lack of concern for whether Andy might observe his aberrant sexual behavior." (*Ibid*.)

Finally, in *In re Maria R.* (2010) 185 Cal.App.4th 48, the Fourth District Court of Appeal determined that a father who had sexually abused his 12- and 14-year-old daughters, as well as two adult daughters from a previous marriage, could reasonably be found to pose a risk of sexual abuse to a 10-year-old daughter who was the same age as her older sisters when their abuse began and who often slept in her parents' bed. (*Id*. at pp. 61–62.) But the court departed from *Andy G.* and *P.A.* by concluding that such sexual abuse, by itself, was insufficient to place an eight-year-old brother at risk of sexual abuse under section 300, subdivision (j).

The evidence here discloses heinous and aberrant sexual abuse by father of his stepdaughter, who was 10 years old when the abuse began and 14 when she became impregnated by father. But there was no evidence to show that father's biological son Andrew was at substantial risk of *sexual* abuse by father. Andrew denied ever having his private parts touched by father or that father ever made him feel uncomfortable. There was no evidence that any sexual abuse of A.C. took place in Andrew's presence or that father had any sexual interest in boys. As such, the record does not support a finding that Andrew was at risk of sexual abuse by father. Therefore, we direct the juvenile court to strike section (d-1) of the petition as it relates to Andrew.

D. Section 300, Subdivision (j)

Section 300, subdivision (j) provides jurisdiction when "[t]he child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a

substantial risk that the child will be abused or neglected, as defined in those subdivisions. The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child."

Father argues that because Andrew was not sexually abused or neglected, as defined in subdivisions (b) or (d) of section 300, jurisdiction cannot be supported under subdivision (j). Father is wrong. "[W]here, as here, a child's sibling has been sexually abused by a parent, subdivision (j) allows the court to assume jurisdiction of the child if, after considering the totality of the child's circumstances, the court finds that there is a substantial risk to the child in the family home, under *any* subdivision enumerated in subdivision (j), taking into consideration the totality of the child's and sibling's circumstances." (*In re Maria R., supra*, 185 Cal.App.4th at p. 65.)

We agree with *Maria R.* that section 300, subdivision (j) "was intended to expand the grounds for the exercise of jurisdiction as to children whose sibling has been abused or neglected as defined in section 300, subdivision (a), (b), (d), (e), or (i)," and that its application is not limited to the risk that the child will be abused or neglected as defined in the same subdivision that describes the abuse or neglect of the sibling. (*In re Maria R., supra*, 185 Cal.App.4th at p. 64.) "The broad language of subdivision (j) clearly indicates that the trial court is to consider the totality of the circumstances of the child and his or her sibling in determining whether the child is at substantial risk of harm, within the meaning of *any* of the subdivisions enumerated in subdivision (j). The provision thus accords the trial court greater latitude to exercise jurisdiction as to a child whose sibling has been found to have been abused than the court would have in the absence of that circumstance." (*Id*. at p. 64.) "Subdivision (j) thus allows the court to take into consideration factors that might not be determinative if the court were adjudicating a petition filed directly under one of those subdivisions." (*Ibid*.; see also *In re Ashley B.* (2011) 202 Cal.App.4th 968, 982–983 [opinion by this division].)

"The purpose of the dependency system 'is to provide *maximum* safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, *and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm*.' (§ 300.2, italics added.) 'When a parent abuses his or her own child, or permits such abuse to occur in the household, the parent also abandons and contravenes the parental role. Such misparenting is among the specific compelling circumstances which may justify state intervention, including an interruption of parental custody.'" (*In re Maria R., supra*, 185 Cal.App.4th at p. 63, italics added, quoting *In re Kieshia E.* (1993) 6 Cal.4th 68, 77.)

Father's sexual abuse of A.C. demonstrated a wholesale abandonment of his roles as parent and protector. This is true not only with respect to A.C. and father's unborn son, but of Andrew as well. As the Department's attorney stated at the jurisdiction/ disposition hearing, father's conduct has placed Andrew in the position of "being a sibling and an uncle all at the same time," and forced Andrew "to live through [the] consequences of what has happened" in a family that is now in "turmoil." (See *In re Maria R., supra*, 185 Cal.App.4th at p. 69 [dysfunctional home poses a risk to children's well being].) Father's refusal to view his behavior toward A.C. as forcible rape and his desire to return to his own country demonstrate his unwillingness to take responsibility for his actions and reveal substantial defects in his ability to parent and protect his children, including Andrew, from harm. Furthermore, "there is more than ample evidence to sustain the finding that [father] committed acts of sexual abuse as defined in Penal Code section 11165.1 against [A.C.]. These findings constitute prima facie evidence that [Andrew] is a child described by section 300, subdivision (a), (b), (c) or (d) and that he is at substantial risk of abuse or neglect." (*In re Maria R., supra*, at p. 69; § 355.1, subd. (d).)

We are satisfied that in light of the circumstances here, the juvenile court was justified in taking jurisdiction over Andrew under section 300, subdivision (j). "As long as there is one unassailable jurisdictional finding, it is immaterial that another might be

inappropriate." (*In re Ashley B., supra,* 202 Cal.App.4th at p. 979; *In re Maria R., supra,* 185 Cal.App.4th at p. 60.)

II. Disposition Order

Father contends the trial court abused its discretion in denying him reunification services with respect to Andrew, who did not want father to be granted such services. We decline to address father's legal arguments regarding the applicable statutes and instead find this contention without merit for the simple reason that father made it very clear in the juvenile court that he had no intention of reunifying with anyone. We need not consider father's change of position on appeal. (*Koehl v. Verio, Inc.* (2006) 142 Cal.App.4th 1313, 1339.)

DISPOSITION

The case is remanded to the juvenile court with directions to strike sections (b-1) and (d-1) from the section 300 petition as they relate to Andrew. In all other respects, the jurisdiction and disposition orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST